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IN THE

Supreme Court of the United States

October Term, 1952.

No. **672**.

THE BIEVER MOTOR CAR COMPANY,
Petitioner,

v.

CHRYSLER CORPORATION,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

HERBERT L. EMANUELSON,
JAMES G. AUSTIN,
RICHARD J. BOOKHOUT,
STERLING P. HARRINGTON,
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THE REPORTER COMPANY, INC., Walton, N. Y.—1953

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE UNITED STATES:

Biever Motor Car Company, the plaintiff below, prays that a writ of certiorari be issued to review the decision of the Court of Appeals for the Second Circuit affirming the judgment of the District Court for the District of Connecticut granting defendant's motion for summary judgment and dismissing petitioner's complaint on the merits.

Opinions Below.

The opinion of the United States District Court for the District of Connecticut (R. 60) is not reported.

The opinion of the Court of Appeals (R. 77) is reported in 199 F. (2d) 759.

Jurisdiction.

The jurisdiction of this Court is invoked under U. S. C. Title 28, Section 1254 (1) (62 Stat. 928)

The decision to be reviewed was rendered by the Court of Appeals for the Second Circuit on December 1, 1952 (R. 77). An order of Hon. Fred M. Vinson, Chief Justice of the United States, made March 2, 1953, and entered in this Court on March 2, 1953, extended the time of petitioner to file its petition for a writ of certiorari to and including March 23, 1953 (R. 79). This petition is being filed in conformity with, and within the time limited by, the provisions of Rule 38 of the Rules of this Court and U. S. C., Title 28, Section 2101 (c) (62 Stat. 961, 63 Stat. 104) as thereby extended.

Questions Presented.

1. Whether the contract between the parties may be terminated by the manufacturer in the absence of good faith, wrongfully, maliciously and without cause?

2. Whether a dealer has a cause of action for breach of the contract where the purported right of termination is exercised to accomplish an illegal purpose?

3. Whether summary judgment should be adopted to decide issues of far flung import, on which the economic life of a large section of an industry depends?

Statutes Involved.

So far as material subdivisions (b) and (c) of Rule 56 of the Rules of Civil Procedure in the United States District Courts provide as follows:

"Rule 56. SUMMARY JUDGMENT

"(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

"(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. * * *"

Statement of the Matter Involved.

The complaint alleged, and the defendant's motion for summary judgment (R. 27) admits, the pertinent facts:

On August 29, 1944, the plaintiff, a Connecticut corporation, and the defendant, a Delaware corporation, entered into a contract in writing, consisting of two documents ("Exhibit A" R. 7 and "Exhibit B" R. 23) granting the plaintiff an exclusive agency for the sale of Chrysler cars.

The defendant, in the absence of good faith, wrongfully, maliciously and without cause, attempted to abrogate by unilateral action its contract with the plaintiff and broke the contract by failing to deliver cars. The plaintiff's damages were computed at $965,637, Exhibit 3 (R. 39), being loss of profits on cars it estimated should have been delivered from the time of breach to and including the end of the second following year.

The District Court held that the defendant was entitled to terminate the contract with the plaintiff without cause and granted judgment to the defendant dismissing the complaint on its merits and entered its judgment accordingly (R. 70). In so doing, the Court necessarily decided that so long as written notice was sent and received it mattered not that such notice was sent "in the absence of good faith, wrongfully, maliciously and without cause" as stated in the complaint.

On December 1, 1952, the Court of Appeals filed its opinion affirming the District Court "on the authority of *Bushwick-Decatur Motors, Inc. v. Ford Motor Co.* (C. A. 2d), 116 F. 2d 675" (R. 77). Judgment of affirmance was entered the same day (R. 78).

Specifications of Errors to be Urged.

The Courts below erred in granting summary judgment.

Reasons for Granting the Writ.

The facts alleged in the complaint are admitted by the motion for summary judgment. The defendant therefore cancelled the contract "in the absence of good faith, wrongfully, maliciously, and without cause," thereby breaching the contract.

The motion of the defendant was under Rule 56 (c) of the Rules of Federal Practice.

1. The decision determines an important question of local law in a way probably in conflict with applicable local decisions.

The contract involved in this action provides that it "be interpreted and construed according to the laws of the State of Michigan" (R. 20).

The Courts below in granting summary judgment held that the mere giving of notice effectively terminated the contract, and in so doing adopted a construction contrary to leading decisions of the Supreme Court of Michigan, which require that such termination be in good faith.

The leading case in the State of Michigan is *J. R. Watkins Co. v. Rich*, 254 Mich. 82, 235 N. W. 845 (1931). In that case a sales agency contract provided that either of the parties "may terminate this agreement at any time by giving the other party notice thereof in writing by mail." The Supreme Court of Michigan held that the option to terminate must be exercised in good faith stating: "A provision in a contract for termination at the option of a party is valid. But where the relationship is commercial and does not involve fancy, taste, sensibility, judgment, or other personal features, the option may be exercised only in good faith." In its decision the Michigan Court cited *Holton v. Monarch Motor Car Co.*, 202 Mich. 271, 168 N. W. 539 (1918), which held that an early automobile agency contract did involve fancy, taste, and sensibilities, but even so questions of bad faith and fraud in exercising the option to terminate were for the jury to decide.

In *Isbell v. Anderson Carriage Co.*, 170 Mich. 304, 136 N. W. 457 (1912), the factory cancelled a dealership under a provision of the contract which provided "that the method of conducting said agency and the detailed care given to each of the Anderson machines which are sold shall be such as will at all times be entirely satisfactory to the Anderson Carriage Company." The Supreme Court of Michigan said that if the "dissatisfaction claimed is shown to be insincere, in bad faith, dishonest, or fraudulently set up as a subterfuge it will be no defense," and a jury question was raised.

Other cases establishing the law of Michigan in similar fashion are *Fuchs v. Standard Thermometer Co.*, 178 Mich. 37, 144 N. W. 484 (1913), *Brusker v. Manistee, etc., R. Co.*, 166 Mich. 330, 130 N. W. 822 (1911).

The Courts below ignored the differences in wording and meaning between the provisions of the Chrysler dealership contract involved in the instant case and the Ford dealer contract involved in an earlier Second Circuit case, *Bushwick-Decatur Motors v. Ford Motor Co.*, 116 F. (2d) 675 (C. C. A. 2, 1940). See 30 F. Supp. 917 for opinion below. In any event, certiorari apparently was not sought in the *Bushwick-Decatur* case (*supra*) which failed to apply the law of Michigan requiring good faith in termination. The reasons set forth in the *Bushwick-Decatur* case (*supra*) to distinguish its facts from Michigan case of *J. R. Watkins v. Rich* (*supra*) were that the Ford contract was expressly made terminable "at the will of either party" whereas the Watkins contract provides only that it might be terminated "at any time"; and that there appeared to be elements of fraud present in the inception of the Watkins contract, but not in the *Bushwick-Decatur* case. Although the *Bushwick-Decatur* case was held controlling of the instant case by the Courts below, in fact the wording of the Chrysler contract more nearly corresponds with the Watkins contract in that the words "at the will of either party" are not included in the termination provisions. So also, under the allegations of the complaint in this action, plaintiff should be permitted to put in his proof as to the circumstances at the inception and purported termination of the contract to show a similar situation as existed in the *Watkins* case.

It is submitted that the Court below in deciding the *Bushwick-Decatur* case varied from the Michigan law by distinguishing the facts; and by summarily disposing of the instant case on the authority of the *Bushwick-*

Decatur case the Court below extends the effect of its earlier decision to a situation involving different facts, and thereby refuses to follow the applicable Michigan law as set forth in *J. R. Watkins v. Rich* (*supra*).

2. The decision of the Court of Appeals is in conflict with decisions of this Court.

The District Court determined the case on the word *desire* in the provision of the contract defining the rights of the parties as to termination of the contract upon notice which reads, "It is also recognized that certain other conditions may arise under which either party may desire to terminate this agreement by giving reasonable notice to the other party" (R. 62).

The decision therefor rests upon the theory that once the desire to cancel is held by the manufacturer, no restriction exists as to its exercise, save that the notice be in the form provided for by the contract.

The Court of Appeals in affirming the decision necessarily affirmed this position which fails to take into consideration those decisions of this Court which stand upon the basis that the right of cancellation, whatever its terms, may not be used to accomplish an illegal purpose.

> *Emich v. General Motors Corp.*, 340 U. S. 558, 95 L. Ed. 535, 71 Sup. Ct. 408.

An examination of the opinion in the Court of Appeals in the criminal portion of the *Emich* case shows that Emich was cancelled in accordance with the terms of the contract. *U. S. v. General Motors Corp.*, 21 F. 2d 376, 396. However, since the cancellation was for an illegal purpose (violation of the Sherman Act) the defendant was not freed from liability because it gave the technical notice provided for in the contract.

In the instant case for all the District Judge could know from the pleadings the plaintiff would be entitled to prove a course of conduct by the defendant which would make applicable the principle on which the *Emich* case and the anti-trust cases are founded. This the District Court and the Court below entirely ignored.

Assuming that the plaintiff could establish by proof that the purported cancellation of the contract was "wrongful" by reason of illegality, the complaint as framed raised a genuine issue of a material fact (Rules of Civil Procedure, Sec. 56 [c]).

It is submitted that the decision below is also in conflict with the interpretation of Rule 56 of the Rules of Civil Procedure of the United States District Courts in the decision of this Court in *Kennedy v. Silas Mason Co.*, 334 U. S. 249, 257; 92 L. Ed. 1347, 68 Sup. Ct. 1031, in which the Court said:

> "We do not hold that in the form the controversy took in the District Court that tribunal lacked power or jurisdiction for applying the summary judgment procedure. But summary procedures, however salutary where issues are clear-cut and simple, present a treacherous record for deciding issues of far-flung import, on which this Court should draw inferences with caution from complicated courses of legislation, contracting and practice" (at 256-7).

In fact the decision of the Court below goes to such lengths to construe the language of the contract as to termination, i. e., "certain other conditions may arise under which either party may desire to terminate this agreement" (R. 12), to mean "either party may desire" to terminate the contract, that the opinion may for all practical purposes be said to have ruled that there was in fact no contract between the parties. This was for-

merly the position of the manufacturers in this type of case but has given way to the modern view that the instrument is in fact a contract (see 4 Williston, Contracts [Rev. Ed.], Sec. 1027 A [5], pp. 2854-66) to which the District Court gave lip service stating:

> "Although the defendant denied the allegation in the complaint that the agreements between it and Biever constituted a contract, for present purposes it concedes that a contract did in fact exist" (R. 64-65).

The entire construction of the contract by the District Court and affirmed by the Court of Appeals is in contravention of the rule established by this Court in *Anvil Mining Co. v. Humble*, 153 U. S. 540, 38 L. Ed. 814, 14 Sup. Ct. 876, which held that the fact that a contract gave a party the right to terminate it in certain contingencies did not give him a right to terminate it arbitrarily.

3. The queston here presented is one of general importance throughout the forty-eight states and has not been, but should be, settled by this Court.

The holding by the Courts below that an automobile dealership contract may be cancelled by the manufacturer "in the absence of good faith, wrongfully, maliciously and without cause," is of extreme importance to the automotive dealers of the country. Under this ruling the manufacturer is to all intents and purposes freed from any restraint on his exercise of the right to terminate the contract regardless of the language used in the contract.

The impact of this decision reaches a large segment of the economy. The United States Census of Business, 1948, shows that in that year there were 779,000 persons

employed in automotive production, while at the same time there were a total of 565,167 persons employed by new vehicle dealers. Better than 80 per cent of the new vehicle production was concentrated in the "Big Three," namely, General Motors, Chrysler and Ford, of which Chrysler was the second largest. The form of Direct Dealer Agreement here involved was uniformly used throughout Chrysler's dealer organization for Chrysler, DeSoto and Dodge dealers, each of whom generally sold the Plymouth also. At the same time, the distribution function was separated into 43,999 separate new vehicle dealer units throughout the country of which this plaintiff was one. These many comparatively small dealer organizations are required to maintain a "satisfactory" place of business, often elaborate and expensive, and to maintain service facilities and personnel, as well as inventories of spare parts. They are dependent upon the continuance of their franchise and their bargaining position is insignificant against that of the manufacturer, especially in times of a sellers' market when a dealership represents a particularly valuable asset. This tremendous disparity in bargaining position, and the possibilities of evil inherent therein, have been recognized as matters of great public interest. F.T.C. Report on the Motor Vehicle Industry (1939), H. R. Doc. No. 468, 76th Cong., 1st Sess. 140-145. See also 63 Harvard L. Rev. 1010, *et seq.* (April, 1950).

The decision of the Court below rather than being a deterrent to the evils inherent in the entire franchise system, gives added opportunities to the manufacturer to coerce the dealers in manners which have heretofore been forbidden.

CONCLUSION.

For these reasons this petition for writ of *certiorari* should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM 1952

No. 672

THE BIEVER MOTOR CAR COMPANY,
Petitioner,

against

CHRYSLER CORPORATION,
Respondent.

BRIEF OF RESPONDENT CHRYSLER CORPORATION IN OPPOSITION TO PETITION FOR CERTIORARI

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BRIEF OF RESPONDENT CHRYSLER CORPORATION IN OPPOSITION TO PETITION FOR CERTIORARI

Opinions Below

There is reported at 108 F. Supp. 948 the opinion of the District Court for the District of Connecticut (Hincks, D. J., May 6, 1952) granting, in this action for breach of contract, the motion of defendant Chrysler Corporation for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure and dismissing the action on its merits (R. 70).*

There is reported at 199 F. (2d) 758 the per curiam opinion of the Court of Appeals for the Second Circuit (A. N. Hand, Chase and Clark, C. JJ., December 1, 1952) unanimously affirming the judgment of the District Court

*All citations to the Record are to page numbers of the printed Transcript of Record, unless otherwise stated.

upon the authority of *Pushwick-Decatur Motors* v. *Ford Motor Company,* 116 F. (2d) 675 (C. C. A. 2, 1940) (R. 77).

Jurisdiction

The judgment of the Court of Appeals was entered December 1, 1952 (R. 78). Petitioner's time within which to file its petition for certiorari was extended, by order of this Court entered March 2, 1953, to and including March 23, 1953 (R. 79), upon which date the petition for certiorari was filed. Jurisdiction of this Court is invoked by petitioner pursuant to 28 U. S. C. § 1254(1).

Question Presented

There being no genuine issue as to any material fact in the case (R. 65),* the sole question presented to the courts below for determination was the question of law as to whether defendant's right to terminate the contract after giving proper notice under Section 8 thereof was conditioned upon a requirement of just cause or good faith in the exercise of the said right of termination (R. 64-65). The District Court held (108 F. Supp. 948, 951; R. 69), and the Court of Appeals unanimously affirmed (199 F. 2d 758; R. 77), that defendant was entitled to terminate its contract with plaintiff without cause.

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*Defendant's motion for summary judgment was made at the suggestion of plaintiff's counsel during the course of certain discovery proceedings in the District Court (R. 28, 43). Both parties desired a decision by the District Court in advance of trial upon the legal question of the interpretation of the contract (R. 28, 43). The District Court stated in its opinion (R. 65): "The point of interpretation may properly be determined on this motion since it involves no dispute as to the underlying facts."

Statute Involved

There is no statute involved in this case. Defendant's motion for summary judgment, made at the suggestion of plaintiff (R. 28, 43), was authorized by Rule 56 of the Federal Rules of Civil Procedure.

Statement of the Case

A concise statement of the case is set forth in the opinion of the District Court (108 F. Supp. 948-951; R. 60-65).*

Grounds of Respondent's Opposition to the Petition

Respondent opposes the petition for certiorari on the following grounds:

1. The decisions of the courts below do not determine an important question of local law in conflict with applicable local decisions.
2. The decisions of the courts below are not in conflict with decisions of this Court.
3. The decisions of the courts below present no question of sufficient public importance to warrant review by this Court.

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*Contrary to petitioner's assertion (Petition, pp. 3, 4), the facts alleged in the complaint are not admitted on a motion for summary judgment. Specifically, the allegations in the complaint that defendant "in the absence of good faith, wrongfully, maliciously and without cause, attempted to abrogate by unilateral action its contract with the plaintiff" (R. 2), although denied in the answer (R. 25), were found by the District Court to be not material to the question of interpretation of the contract presented for determination (R. 65), a holding which was unanimously affirmed by the Court of Appeals (R. 77).

ARGUMENT

I

THE DECISIONS OF THE COURTS BELOW DO NOT DETERMINE AN IMPORTANT QUESTION OF LOCAL LAW IN CONFLICT WITH APPLICABLE LOCAL DECISIONS.

The asserted question of local law referred to in the petition concerns only the local law of the State of Michigan, which law the courts below applied. "Where the lower federal courts are applying local law", this Court "will not set aside their ruling except on a plain showing of error." *Palmer* v. *Hoffman,* 318 U. S. 109, 118 (1943); cf. *Huddleston* v. *Dwyer,* 322 U. S. 232, 237 (1944). Even where there is a conflict among courts of appeals on questions of local law this Court has not considered this factor of itself as a sufficient reason for granting certiorari. *Ruhlin* v. *New York Life Insurance Company,* 304 U. S. 202, 205-206 (1938). There is no such conflict here.

There can be no "plain showing of error" in the application of Michigan law in this case for the lower courts' decisions correctly interpreted Michigan law.

J. R. Watkins Company v. *Rich,* 254 Mich. 82, 235 N. W. 845 (1931), upon which petitioner heavily relies (Petition, pp. 5-7), requires no different result. That case was considered at length by the Court of Appeals for the Second Circuit in *Bushwick-Decatur Motors* v. *Ford Motor Company,* 116 F. 2d 675, 676-677 (C. C. A. 2, 1940) and the court concluded that it was not a binding authority upon it for the reasons (1) that it involved a fixed term contract; (2) that good faith in exercising the right of termination prior to the expiration date was implicit, particularly with respect to the defendant sureties, otherwise the contract

would have been void for fraud in its inception; and (3) that it did not overrule cited earlier Michigan decisions holding a sales agency contract, without any expressed duration, to be terminable entirely at the discretion of the parties.

This view is further strengthened by the decision of *Martin* v. *Ford Motor Company,* 93 F. Supp. 920 (E. D. Mich. 1950). There Judge Picard, sitting in the District Court for the Eastern District of Michigan and interpreting Michigan law,* including the *Watkins* decision, held that the *Bushwick-Decatur* decision properly applied the law of Michigan and further held (p. 921):

> "... The Supreme Court of Michigan by its decision in J. R. Watkins Co. v. Rich, 1931, 254 Mich. 82, 235 N. W. 845, did not overrule prior decisions such as Koehler v. Buhl, 1893, 94 Mich. 496, 54 N. W. 157; Garlock v. Motz Tire & Rubber Co., 1916, 192 Mich. 665, 159 N. W. 344; Schmand v. Jandorf, 1913, 175 Mich. 88, 140 N. W. 996; Fuchs v. Standard Thermometer Co., 1913, 178 Mich. 37, 144 N. W. 484. Also McClintock Co. v. Truxall Sales & Service, Inc., 1941, 297 Mich. 284, 297 N. W. 493."

The *Watkins* case has been held not controlling in two other cases of a similar nature: *Green Bay Auto Distrib-*

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*Cf. *Estate of Spiegel* v. *Commissioner,* 335 U. S. 701, 707-708 (1949): "... The questioned ruling was made by three judges who are constantly required to pass upon Illinois law questions. One of the three judges has long been a resident and lawyer of Illinois. Examination of the Illinois State Court opinion pressed upon us leaves us unable to say with any degree of certainty that the Court of Appeals holding was wrong. ... It is sufficient for us to say that we think reasonable arguments can be made based on Illinois cases to support a determination of this question either for or against the petitioner's contention. Under these circumstances we will follow our general policy and leave undisturbed this Court of Appeals holding on a question of State law."

utors v. *Willys-Overland Motors,* 102 F. Supp. 151, 160-161 (N. D. Ohio 1951), and *Busam Motor Sales* v. *Ford Motor Company,* 104 F. Supp. 639, 641-643 (S. D. Ohio 1952).

The distinction urged by petitioner (Petition, p. 6) between the Chrysler contract here involved and the Ford contract involved in the *Bushwick-Decatur* case, i.e., the use of the word "desire" in the former (Section 8 of the Chrysler contract) instead of the words "at will" in the latter, is of no substance. A contract of the type under discussion, without a fixed duration, under Michigan decisions is terminable at the will or discretion of either party.

> *Fuchs* v. *Standard Thermometer Company,* 178 Mich. 37, 144 N. W. 484 (1913);
>
> *Garlock* v. *Motz Tire & Rubber Company,* 192 Mich. 665, 159 N. W. 344 (1916).

In the *Martin* case, the court, in determining the meaning of the words "at will" in the Ford contract, said (p. 921):

> "In the instant case it is clear that Martin's dealership was to continue no longer than either he or the Ford Motor Company *desired* it to continue and that its right to terminate it was subject to no conditions as to good or bad faith, motive, intent or results, except as to the requirement of advance notice if such termination was *desired* by the Ford Motor Company." (Italics added)

II

THE DECISIONS OF THE COURTS BELOW ARE NOT IN CONFLICT WITH DECISIONS OF THIS COURT.

Petitioner asserts (Petition, pp. 7-8) that the decision below is in conflict with this Court's decision in *Emich Motors Corporation* v. *General Motors Corporation,* 340 U. S. 558 (1950). The *Emich* case, never cited or referred to by petitioner in either of the courts below, was a suit under Section 4 of the Clayton Act to recover treble damages for injury sustained by reason of a conspiracy in restraint of trade. The sole issue before this Court in that case was whether the Court of Appeals erred in construing Section 5 of the Clayton Act as preventing (a) the admission of the indictment in the antecedent criminal case against respondents, and (b) the judgment therein to be used as evidence that the conspiracy of which respondents had been convicted occasioned the cancellation of Emich Motors' contract.

Respondent submits that this Court's holding in the *Emich* case is wholly irrelevant to and in no way in conflict with the lower court decisions in the instant case. Moreover, even if petitioner's theory that "the right of cancellation, whatever its terms, may not be used to accomplish an illegal purpose" is correct, there is no allegation in the complaint that the contract in the instant case was to accomplish and illegal purpose, and petitioner never has so claimed. Even at this late date there is, and can be, no showing that this contract was for an illegal purpose.

Petitioner also asserts here for the first time (Petition, p. 8) that the use of the summary judgment procedure in the instant case is in conflict with this Court's comment in *Kennedy* v. *Silas Mason Company,* 334 U. S. 249, 257

(1948). That case was vastly different from the instant case. There, this Court was presented with a complicated question concerning the proper amount of overtime compensation under the Fair Labor Standards Act. There were many issues involved. The parties asserted numerous conflicting inferences from the facts. Certain contentions were made in this Court which were not made in the courts below. Adequate handling of the problem would have required consideration of three different Acts of Congress, two of which were not properly before the Court.

Here on the other hand, summary judgment certainly was proper. The sole question was whether the contract, terminable at will, only upon notice, should be construed to be terminable only for cause. To decide this question the courts below had only to interpret the contract provisions in the light of the applicable law. Nothing more was required. The issue was as nearly clear-cut and simple as any that is likely to arise on a summary judgment motion. The claim of counsel for petitioner to the contrary, in this Court, is as audacious as it is unfounded. By suggesting in the District Court that the issue of interpretation of the contract be determined on a motion for summary judgment (R. 28, 43), counsel for petitioner in effect stipulated that there was no genuine issue as to any material fact (R. 64-65).

Petitioner's reliance upon *Anvil Mining Company* v. *Humble,* 153 U. S. 540 (1894), is not warranted. In that case this Court held that a contract terminable only upon the happening of a certain contingency was not terminable at will. In the instant case termination was not subject to any conditions other than notice which concededly was given (R. 65).

III

THE DECISIONS OF THE COURTS BELOW PRESENT NO QUESTION OF SUFFICIENT PUBLIC IMPORTANCE TO WARRANT REVIEW BY THIS COURT.

Petitioner seeks to have this Court construe a standard provision in automobile dealership contracts contrary to the plain and unambiguous meaning of the words used.* Respondent submits that to do so would upset the well-established meaning of such a provision in all such contracts and contracts in other fields as well. At the present time both contracting parties know their rights under such a provision, for all reported cases on this issue uniformly hold that this clause permits termination of the contract, with or without cause, merely upon notice. See *Bushwick-Decatur Motors* v. *Ford Motor Company,* 116 F. (2d) 675, 676-677 (C. C. A. 2, 1940); *Martin* v. *Ford Motor Company,* 93 F. Supp. 920, 921 (E. D. Mich. 1950); *Green Bay Auto Distributors* v. *Willys-Overland Motors,* 102 F. Supp. 151, 160-161 (N. D. Ohio 1951); *Busam Motor Sales* v. *Ford Motor Company,* 104 F. Supp. 639, 641-643 (S. D. Ohio 1952); *Wood Motor Company* v. *Nebel,* 238 S. W. (2d) 181 (Tex. Sup. Ct. 1951); *Goodwin Bros.* v. *Cook,* 307 Ky. 646, 212 S. W. (2d) 126 (1948); *Wass* v. *Chrysler Corp.,* 127 N. Y. L. J. 1941 (Sup. Ct., Nassau County, May 14, 1952).

Moreover, if the violent twisting of language that petitioner asserts is to be read into the contract, respondent believes with Judge Clark and Judge Picard that petitioner's

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*The third reason urged upon this Court by petitioner for granting a writ (Petition, pp. 9-10) is based almost entirely upon facts not contained in the record in the instant case.

argument in support thereof should be addressed to the legislature, not to the judiciary.

Judge Clark in the *Bushwick-Decatur* case said (p. 677):

> "With power of termination at will here so unmistakably expressed, we certainly cannot assert that a limitation of good faith was anything the parties had in mind. Such a limitation can be read into the agreement only as an overriding requirement of public policy. This seems an extreme step for judges to take."

Judge Picard in the *Martin* case said (p. 921):

> "The agreement in this case was not for a fixed period but was terminable at will at any time at defendant's will upon compliance with the requirement as to notice. It is beyond the power of the judiciary to engraft conditions upon the exercise of such a contractual right."

CONCLUSION

The petition for certiorari should be denied.

Dated: Stamford, Connecticut, April 15, 1953.

Respectfully submitted,

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FILED
APR 21 1953
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1952.

No. 672.

THE BIEVER MOTOR CAR COMPANY,
Petitioner,

v.

CHRYSLER CORPORATION,
Respondent.

Reply Brief of Petitioner in Support of Petition for a Writ of Certiorari.

HERBERT L. EMANUELSON,
JAMES G. AUSTIN,
RICHARD J. BOOKHOUT,
STERLING P. HARRINGTON,
Counsel for Petitioner.

THE REPORTER COMPANY, INC., Walton, N. Y.—1953

In the

Supreme Court of the United States

October Term, 1952.

No. 672

The Biever Motor Car Company,
Petitioner,

v.

Chrysler Corporation,
Respondent.

REPLY BRIEF OF PETITIONER IN SUPORT OF PETITION FOR A WRIT OF CERTIORARI.

Since the filing of the petition for a writ of certiorari in the matter, the Court of Appeals for the Sixth Circuit handed down an important decision which should be considered by this Court in passing on the instant application. *Busam Motor Sales v. Ford Motor Company,* United States Court of Appeals for the Sixth Circuit, No. 11673, decided April 14, 1953. This opinion is set forth in full in the appendix to this brief.

The decision of the Court of Appeals for the Sixth Circuit reverses the decision in *Busam Motor Sales v. Ford Motor Company,* 104 F. Supp. 639 (S. D. Ohio, 1952), which District Court decision was relied upon and cited by respondent opposing this petition (Respondent's Brief, pp. 6, 9).

The recent decision in the Sixth Circuit reaffirms the doctrine of *J. R. Watkins Co. v. Rich,* 254 Mich. 82, as the

existing law of the State of Michigan. The decision appears to conflict with the decision of the Court of Appeals for the Second Circuit in the instant case. This decision further indicates that the Court below decided the instant case in a way probably in conflict with the applicable local decisions, and as stated in the petition herein (p. 6), the plaintiff should be permitted to put in its proof as to circumstances at the inception and purported termination of the contract to show a similar situation as existed in the *Watkins* case.

The petition for writ of certiorari should therefore be granted.

Respectfully submitted,

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APPENDIX.

No. 11673

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT.

BUSAM MOTOR SALES, Inc., a Corporation organized under the laws of the State of Ohio, Appellant, v. FORD MOTOR COMPANY, a Corporation organized under the laws of the State of Delaware, Appellee.	Appeal from the District Court of the United States for the Southern District of Ohio.

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Decided April 14, 1953.

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Before ALLEN, MARTIN and MILLER, Circuit Judges.

MILLER, Circuit Judge. This is an appeal from a judgment based on a verdict of a jury in favor of the defendant-appellee, Ford Motor Co., directed by the Trial Judge at the conclusion of the opening statement of the plaintiff-appellant.

Appellant, who was an authorized distributor of appellee's motor vehicles under appellee's standard form of contract, instituted this action to recover damages alleged to have resulted from the illegal termination of the con-

tract by the appellee. In a former trial, appellant obtained a verdict in the amount of $87,000, which the District Judge set aside by granting a motion for a new trial, overruling at the same time a motion for judgment notwithstanding the verdict. *Busam Motor Sales, Inc. v. Ford Motor Co.*, 85 Fed. Supp. 790. The Ford Motor Company appealed from that portion of the order which overruled its motion for judgment notwithstanding the verdict. This Court dismissed the appeal on the ground that it was not an appealable order. *Ford Motor Co. v. Busam Motor Sales, Inc.*, 185 Fed. (2d) 531, C. A. 6th. The facts in detail can be obtained from those two opinions.

The original complaint alleges that by contract of March 4, 1946, the appellant was designated by the appellee as an authorized distributor of its motor vehicles; that, according to its terms, the contract could be terminated at any time at the will of either party by written notice to that effect; that on July 7, 1947, the appellant was notified by registered mail of the appellee's intention to terminate the agreement effective September 5, 1947, which purported termination was not made in good faith on the part of the appellee, but solely to deprive the appellant of profits which it would have received upon the filling of 316 unfilled orders for appellee's motor vehicles; that appellee, in defraud of appellant's rights, refused to deliver any automobiles to the appellant to enable it to fill the orders; "and that by reason of the fraud, bad faith and refusal of defendant to make said delivery, plaintiff company has been damaged" in the amount of $105,768.00. Following the dismissal of the appeal by this Court and the remand of the case to the District Court for a second trial, the appellant, on March 17, 1952, moved in the District Court to amend its complaint, the proposed amendment reading as follows:

"Plaintiff says that said purported termination was not in good faith on the part of the defendant company, and that the defendant company at the time it entered into the contract intended to terminate said contract, and did not execute said agreement of March 4, 1946, in good faith." The Trial Judge overruled the motion and the case was set for trial on March 31, 1952.

Appellant's counsel in his opening statement to the jury on the second trial reviewed the evidence which appellant would offer in support of its claim, and stated to the jury in closing as follows:

> "So, members of the jury, that is the evidence we expect to prove the contract was cancelled. As I said, notice was given on July 7 and the cancellation took place on September 5th. It is our claim that there was bad faith on the part of the Ford Motor Company from the very inception of this contract and that this bad faith resulted in the cancellation, not terminating in good faith, not entered into in good faith, not performed in good faith, and we contend the Ford Motor Company is liable and responsible for the damages to the Busam Motor Sales, Incorporated."

Appellee moved for the entry of judgment in its favor on the basis of the pleadings and the opening statement, and also for summary judgment in its favor. The Trial Judge sustained the motions by directing a verdict for the appellee, which was duly returned by the jury, followed by judgment for the appellee. Appellant filed a motion for a new trial, which the Trial Judge overruled, and this appeal followed.

The contract contained the following provision, the construction and effect of which presents the issue involved in this case. "This agreement may be terminated at any time at the will of either party by written notice to the

other party given either by registered mail or by personal delivery, and such termination shall also operate to cancel all orders for Company products theretofore received by Company and not delivered." The contract also provided that it was to be construed in accordance with the laws of Michigan.

The Trial Judge, as shown by his opinion reported at 104 Fed. Supplement 639, was of the view that the provisions of the contract with respect to its termination were valid, and that the right to terminate was not subject to question on the grounds of unreasonableness, unfairness, lack of good faith, bad faith, or because of motive, intent or resulting detriment to the other party. *Bushwick-Decatur Motors v. Ford Motor Co.,* 116 Fed. (2), 675, 676, C. A. 2d; *Martin v. Ford Motor Co.,* 93 Fed. Supp. 920, E. D. Mich. Appellant concedes that such is the rule in most jurisdictions. It is contended, however, that the law of Michigan, which is controlling in this case, is otherwise. In support of its contention, appellant relies upon *J. R. Watkins Co. v. Rich,* 254 Mich. 82. In that case, the Court found against a manufacturer who arbitrarily terminated its contract with a salesman under a provision in the contract permitting either party thereto to terminate it at any time by giving the other party notice thereof in writing by mail. The Trial Court found that the manufacturer had not assigned any reason for the termination of the contract, that the cancellation of the contract by it was an arbitrary exercise of its will "and was not a reasonable good faith exercise of the power conferred by the contract to terminate the same by notice." In affirming the judgment of the lower court the Supreme Court of Michigan stated:

> "A provision in a contract for termination at the option of a party is valid. But where the relationship is commercial and does not involve

> fancy, taste, sensibility, judgment or other personal features, the option may be exercised only in good faith."

The Court held that the testimony "amply warrants the finding of the Court that plaintiff did not act in good faith."

Appellee contends that the ruling in *J. R. Watkins Co. v. Rich, supra,* is not contra to the prevailing rule in other jurisdictions, relying upon the analysis of that case by the Court of Appeals for the Second Circuit in *Bushwick-Decatur Motors v. Ford Motor Co., supra,* concurred in by the District Court for the Eastern District of Michigan in *Martin v. Ford Motor Co., supra.* In the *Bushwick-Decatur Motors* case, the Court held that the rule laid down by *J. R. Watkins Co. v. Rich* did not apply to a case involving merely lack of good faith at the time when the contract was terminated, but was restricted to cases where there was lack of good faith at the time the contract was entered into. The Court said: "'Good faith' here seems to have meant an original intention to offer the agent a fair opportunity, without which the contract would obviously have been void for fraud in its inception." It held the case not applicable to the one under consideration by it by reason of that distinction.

Such analysis of the Michigan law was not concurred in by the Trial Judge who conducted the first trial in the present case. On the basis of the pleadings as they then existed, without benefit of the proposed amendment, he ruled that under the Michigan law "contracts terminable at will are binding on both parties until right of cancellation reserved is exercised by cancellation on the part of one or the other, provided further, that the option to terminate at will must be exercised in good faith, *J. R. Watkins Co. v. Rich,* 254 Mich. 82, * * *," and that

"the element of good faith under the Michigan law remains a question of fact for the jury." *Busam Motor Sales v. Ford Motor Co.*, 85 Fed. Supp. 790. The ruling finds support from other Michigan cases, such as *Brucker v. Manistee & G. R. R. R. Co.*, 166 Mich. 330, 335-337; *Holton v. Monarch Motor Car Co.*, 202 Mich. 271, 274-275; *Hutton v. Sherrard*, 183 Mich. 356, 359-360; *Isbell v. Anderson Carriage Co.*, 170 Mich. 304, 313-314.

For the purposes of the present ruling, we do not express any disagreement with the analysis of Michigan law as made in the *Bushwick-Decatur Motors* case or with the rulings in *Ford Motor Co. v. Kirk Motor Co.*, 65 Fed. (2) 1001, C. A. 4th; *General Motors Corp. v. Keener Motors, Inc.*, 194 Fed. 669, C. A. 6th, or *Green Bay Auto Distributors, Inc., v. Willys-Overland Motors, Inc.*, 102 Fed. Supp. 151, W. D. Ohio, affirmed Fed. (2) , C. A. 6th. Those cases did not involve an alleged lack of good faith in the making of the contract, or as expressed in the *Bushwick-Decatur Motors* case, a lack of "an original intention to offer the agent a fair opportunity, without which the contract would obviously have been void for fraud in its inception." Upon counsel's opening statement, we do not know what the facts will prove to be. They may or may not be the same as those in each of the four cases hereinabove referred to. Counsel's opening statement implied more than was shown in those cases, in that he relied upon *both* a lack of good faith in the termination of the contract, and "bad faith on the part of the Ford Motor Company from the very inception of this contract, * * * not entered into in good faith, not performed in good faith." In our opinion, these words are broad enough to bring the case within the ruling of *J. E. Watkins Co. v. Rich, supra*, even as analyzed and restricted by the opinion in *Bushwick-Decatur Motors v. Ford Motor Co., supra.* The plaintiff is entitled to the benefit of all inferences that may be

drawn from his counsel's opening statement. To warrant the Court in directing a verdict for the defendant upon plaintiff's opening statement, "it is not enough that the statement be lacking in definiteness but it must clearly appear, after resolving all doubts in plaintiff's favor, that no cause of action exists." *Best v. District of Columbia,* 291 U. S. 411, 415. Whether the evidence subsequently offered by appellant at the trial would have supported those allegations is an entirely different question. It is possible that it would have shown certain acts or course of conduct on the part of the appellee from which the required bad faith could be properly inferred, and so present a jury question. *Brucker v. Manistee & G. R. R. R. Co.,* 166 Mich. 330, 336-337; *Isbell v. Anderson Carriage Co.,* 170 Mich. 304, 315; *Holton v. Monarch Motor Car Co.,* 202 Mich. 271, 274-275.

In making his ruling the Trial Judge stated that he had considered all material facts properly plead and statements properly made in accordance with the issues raised by the pleadings. The original complaint alleged that "the purported termination of the agreement was not made in good faith." The tendered amendment was not part of the pleadings, and the ruling dealt only with bad faith in terminating the agreement. The tendered amendment presented another issue, namely, lack of good faith in the execution of said agreement. If the amendment had been permitted, another issue would have been properly before the court, which, in accordance with the views hereinabove expressed, would have required the Trial Judge to have overruled appellee's motion for a directed verdict. Rule 15 of the Rules of Civil Procedure provides that leave to amend shall be freely given when justice so requires. The amendment was offered approximately two weeks before the trial. A copy of it had been furnished to opposing counsel approximately four months before it was tendered in an

effort to get opposing counsel to agree to its filing. While it may have presented a new issue of law, it did not change in any material way the evidence which would be offered by the appellant, which had been fully developed at the first trial. We are of the opinion that the Trial Judge should have permitted the amendment to be filed. *McDowall v. Orr Felt & Blanket Co.*, 146 Fed. (2) 136, 137, C. A. 6th.

Appellee's contention that the amendment was properly denied because it raised a new cause of action which was barred by the statute of limitations is not well taken. *Blair v. Durham*, 134 Fed. (2) 729, C. A. 6th; *Tiller v. Atlanta Coast Line R. Co.*, 323 U. S. 574, 580-581.

Appellee refers to our previous ruling on its appeal from the order of the District Court at the first trial overruling its motion for judgment notwithstanding the verdict, wherein we held that the order appealed from was not a final order and dismissed the appeal. In the opinion we pointed out that the order, although not appealable at that time, was nevertheless a reviewable one later on an appeal from a final judgment. Appellee urges a review of that order at the present time, in that a final judgment has now been entered from which the present appeal was properly taken. Our statement in that opinion was with reference to a final judgment that went against the appellee, from which it could appeal and obtain a review of all adverse rulings at the same time. The present appeal is not by the appellee and the judgment now appealed from is the only matter before us on this review.

The judgment is reversed and the case remanded to the District Court for further proceedings consistent with the views expressed herein.

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APR 24 1953

IN THE

Supreme Court of the United States

OCTOBER TERM 1952

No. 672

THE BIEVER MOTOR CAR COMPANY,
Petitioner,

against

CHRYSLER CORPORATION,
Respondent.

SUPPLEMENTAL BRIEF OF RESPONDENT CHRYSLER CORPORATION IN OPPOSITION TO PETITION FOR CERTIORARI

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THE BIEVER MOTOR CAR COMPANY,
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SUPPLEMENTAL BRIEF OF RESPONDENT CHRYSLER CORPORATION IN OPPOSITION TO PETITION FOR CERTIORARI

Petitioner asserts in its reply brief that the case of *Busam Motor Sales* v. *Ford Motor Company,* decided by the Court of Appeals for the Sixth Circuit on April 14, 1953, "appears to conflict" with the decision of the Court of Appeals for the Second Circuit in the instant case. We submit that there is no conflict whatever between the two decisions.

The Court of Appeals for the Second Circuit in the instant case affirmed the judgment of the District Court on the authority of *Bushwick-Decatur Motors* v. *Ford Motor Company,* 116 F. (2d) 675 (C. C. A. 2, 1940) (R. 77). The Court of Appeals for the Sixth Circuit in the *Busam* case said:

> "For the purposes of this ruling, we do not express any disagreement with the analysis of Michigan law as made in the *Bushwick-Decatur Motors* case."

The *Busam* decision by the Court of Appeals for the Sixth Circuit clearly is distinguishable from the instant case on the ground that in the *Busam* case the court merely held that plaintiff should have been permitted to amend its complaint so as to allege lack of good faith in the *execution* of the contract. In the instant case, there is no allegation of lack of good faith in the *execution* of the contract and plaintiff never has sought to amend its complaint to so allege. Indeed, in the instant case plaintiff relies on the contract and asserts its validity (R. 2-3).

Such distinction is vital and was recognized by the Court of Appeals for the Sixth Circuit in the *Busam* case. After stating that it did not disagree with the analysis of Michigan law expressed by the Court of Appeals for the Second Circuit in the *Bushwick-Decatur* case and by other courts, the Court of Appeals for the Sixth Circuit in the *Busam* case said:

> "Those cases did not involve an alleged lack of good faith in the making of the contract, or as expressed in the *Bushwick-Decatur Motors* case, a lack of 'an original intention to offer the agent a fair opportunity, without which the contract would obviously have been void for fraud in its inception.'"

Absent any claim of lack of good faith in the making of the contract in the instant case, the case of *J. R. Watkins Company* v. *Rich,* 254 Mich. 82, 235 N. W. 845 (1931), has no conceivable application. The Court of Appeals for the Sixth Circuit in the *Busam* case agreed with the Court of Appeals for the Second Circuit in the *Bushwick-Decatur* case in this respect:

> "In the *Bushwick-Decatur Motors* case, the Court held that the rule laid down by *J. R. Watkins Co.* v. *Rich* did not apply to a case involving merely

lack of good faith at the time when the contract was terminated, but was restricted to cases where there was lack of good faith at the time the contract was entered into. The Court said: '"Good faith" here seems to have meant an original intention to offer the agent a fair opportunity, without which the contract would obviously have been void for fraud in its inception.' It held the case not applicable to the one under consideration by it by reason of that distinction."

We submit that, there being no claim in the instant case of lack of good faith in the execution of the contract and petitioner's entire cause of action being predicated upon the existence of a valid contract from its inception, the decision of the Court of Appeals for the Sixth Circuit in the *Busam* case is not in conflict with the decision of the Court of Appeals for the Second Circuit in the instant case, but is in accord therewith.

CONCLUSION

The petition for certiorari should be denied.

Dated: Stamford, Connecticut, April 23, 1953.

Respectfully submitted,

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